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PRESIDENT WILSON AND PROCEDURAL REFORM.

President Wilson's specific recommendation, in his forthcoming message to the 64th Congress, of the modernization of judicial procedure would assure the success of the American Bar Association's campaign. The program simply has in view the transfer of the power to make rules of procedure from the legislatures to the courts.

The importance and rush of other matters, largely party policies, have heretofore crowded out of the President's message the consideration of the modernization of the courts. Yet it is one of the most fundamentally important matters confronting the American Nation. Indeed, how long will either peace or prosperity reign if faith in the courts be lost?

President Wilson's favorable attitude towards the Bar Association's campaign is well known and understood. The great American Bar does not appeal to him in vain. His speech before the Kentucky Bar Association, before he became a candidate for President has been often quoted. His late address at Springfield was equally emphatic. But, in order for the measure to be assured of Congressional attention, it should be specifically included in the President's message as a part of the coming legislative program. A majority of both Senate and House favor the necessary legislation. The House Judiciary Committee has unanimously recommended it.

An organized nation has been patiently awaiting action. Only a reactionary, here and there, has been heard to object. In nearly every commonwealth there are state and district committees at work educating the people to the real cause of their unrest, and suggesting that they call upon their congressmen for relief. Willing enough to help, the answer always is that the program has no official recognition, although Democrats, Republicans and Progressives are in perfect accord. It is one of those measures in the interest of the public welfare that patriotic congressmen have not permitted to be politically exploited.

The Commercial Law League of America, the Chamber of Commerce of the United States, the Southern Commercial Congress, the Bar Associations of forty-five states, and the National Association of Credit Men, as well as hundreds of other organizations, have formally expressed themselves and are working in sympathy with the American Bar Association's Committee on Uniform Judicial Procedure. The demand is unique in legislative history.

And it is not amiss to remark that the greatest compliment ever paid any profession is found in the cheerful willingness of business men to adopt the program of their lawyers for simplifying judicial procedure. This is largely inspired by the magnanimous and unselfish spirit evidenced by the unanimity of the bar in support of this new method of reforming procedure. The new plan received the unanimous support of the American Bar Association and many state associations are equally active in supporting the propaganda.

Four years ago there was every appearance that business men would carry this important feature of government into politics. The demand for a statutory code and the "recall" was rampant and insistent. The chairman of the Committee on Uniform Judicial Procedure of the American Bar Association, Mr. Thomas W. Shelton, of Norfolk, Va., and Ex-President Taft, one of its members, have gone quietly over this country patiently and modestly carrying

home the truth until there has been won the confidence of the business men in the Bar Association's campaign. It has been learned that there is relief and that it lies in an equable division of power between the legislative and judicial branches of government. There will be peace and confidence when Congress shall set the Supreme Court free to regulate the detail procedure of the *nisi prius* courts. The administration of justice will then become a duty of both judge and lawyer. It is sincerely hoped and it is believed that the President will embody in his forthcoming message the specific recommendation to Congress that the American Bar Association's program be promptly legislated into effect, that the Supreme Court may be empowered to do for the law side what it has done so well for the equity side of the federal courts.

The recent success of Mr. Elihu Root, in the New York Constitutional Convention of 1915, in persuading the convention to adopt the plan for reforming procedure recommended by the American Bar Association, is more than a personal achievement, it is an indication that the bar has awakened to its responsibilities in directing public opinion and while the people are not always willing to follow the advice of the profession rather than the wild appeals of self-serving demagogues, it nevertheless becomes the duty of the profession to assert its influence and leadership as never before.

NOTES OF IMPORTANT DECISIONS.

CONTEMPT OF COURT—REFLECTION BY ATTORNEY ON COURT DECIDING CASE IN WHICH THE JUDGES HAD A PECUNIARY INTEREST.—The case of McCoy v. Handlin, 153 N. W. 361, on which we commented in 81 Cent. L. J. 92, returns to plague the Supreme Court of North Dakota, as shown in a later decision by that court in a case of contempt. State v. Kirby, 154 N. W. 284.

The view we then expressed was that the court protested too much its fairness in disposing of a question which by a rule of necessity had to be decided by the court. It was a question of a public nature and it was not the fault of the judges that they were so intimately interested in the result. This interest should have been ignored, we saying, in effect, that had they pursued this course, the case should not return to plague them. We made no claim to being a prophet, but it seems that the case "came back."

In the later case, respondent Kirby was proceeded against for contempt and disbarment. He was counsel in the former case and he sent out a pamphet commenting on the opinion in McCoy v. Handlin. The particular thing for which he was proceeded against was his prediction that the court which had rendered such a decision would not dare to disbar an attorney who was a candidate for governor, in a proceeding that was pending against him on charges.

The language that the respondent used seemed somewhat open to explanation, but the court went back to this pamphlet and makes excerpts from respondent's brief in McCoy v. Handlin, in both of which occurred expressions of a contemptuous nature. What was said in the brief was not noticed in the opinion in McCoy v. Handlin, but in the proceeding against the respondent it was unearthed to explain his intent in the utterance for which he was proceeded against. Respondent was fined $500 for contempt and the disbarment proceedings were dismissed.

The South Dakota Court seems to have been greatly troubled by the respondent, both latterly and formerly, and it has borne with him apparently a long time, he having first been proceeded against in a case reported in 39 L. R. A. 856; and if any criticism might be made of its latest decision, it would be that it erred too greatly on the side of leniency. Respondent appears to have been running *amuck* with the public in his assaults upon the South Dakota Supreme Court, and it is rather surprising to see how anyone employing him could conclude that his methods probably would benefit his clients—not that we suppose the court would be tempted to whip them over his shoulders. At all events, it might be considered bad policy to be represented by one, whom a court would not respect because he does not respect it. Credit for the possession of that ingenuousness which has its legitimate weight would hardly be accorded to such an advocate.

INTOXICATING LIQUORS—POLICE POWER PROHIBITING RECEIPT BY ANY PERSON FOR ANY PURPOSE.—The Supreme Court of Alabama first sustaining the constitutionality of the Webb-Kenyon Law, then holds that a state statute forbidding receipt from any carrier by any person of liquor beyond a certain amount in a certain period, of spirituous, vinous or malt liquors, is also the rightful exercise of legislation. Southern Exp. Co. v. Whittle, 69 So. 652.

The question considered by the court is said to be resolved by the following inquiry: "Is the police power of this state validly exerted, when, in promotion of the suppression of the evils of intemperance, the state enactment places a limitation in respect of quantity upon the possession or receipt of intoxicating liquors within its borders?"

The conclusion arrived at by the court is based greatly on Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, and, especially, on an expression therein, as follows: "If in the judgment of the legisature the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts upon their views as to what is best and safest for the community, to disregard the legislative determination of that question." Thus we see, that not only may right to trade in liquor be restricted, but also there may be restricted the personal, private possession of property under the police power of the state, provided such private possession may by abuse, not reasonably possible to be guarded against, interfere with the protection of public morals, public health or public safety.

Considering the statute in question, it is said: "The law under review does not deny to consumer or consignee in 'dry territory' the right to receive or possess at one time what would seem to be an entire adequate quantity of the character of beverage here involved for the satisfaction or gratification of a reasonable appetite or desire for such liquors. Looking, as doubtless the legislature did, to the historic and more or less familiar fact that evasions of laws against the sale or other distribution of intoxicants are habitually undertaken by the lawlessly disposed, it was conceivable that the minimization of the quantity of whisky, etc., one might lawfully receive or possess in a 'dry territory' at one time, would render, directly, the lawful sale or other disposition less likely to occur." But, after all, it is seen, that one's personal rights are limited because another, and not he, may and probably will, be a lawbreaker. This is, at least, a very wide application of the police power.

CARRIER OF LIVE STOCK—LIMITATION OF LIABILITY NOT APPLICABLE WHERE LOSS WAS FROM CONVERSION OR WILLFUL CONDUCT.—Georgia Court of Appeals holds that: "A carrier cannot exempt itself by contract from the consequences of a tortious act committed through its agents or employes, though not liable as an insurer where it undertakes to transport live stock." N. C. & St. L. Ry. Co. v. Truitt, 86 S. E. 421.

This ruling proceeds on the theory that the commission of such tortious act amounts to abandonment of the contract of shipment, and there is an estoppel against insistence on a stipulation therein limiting liability of the carrier for loss in transportation.

It is said: "A carrier cannot exonerate himself from the fraud or felony of himself or his servants, and a contract will not avail if the act of the carrier or his servants amounts to misfeasance, though ordinary neglect alone in the course of the bailment will not deprive the carrier of the benefit of a contract fairly made, which it limits. Where there is a conversion the wrong-doer cannot take advantage of an agreed valuation of the property in order to lessen the amount of his liability.'

This case concerned the shipment of mules and the substitution of three of them by delivering three greatly inferior mules, so different in appearance that the carrier must have noticed the substitution. In other words, though the mules delivered were not the same as those shipped, the substitution did not prove intent to convert, unless there was gross negligence in not observing they were not the same.

The principle announced by the court would seem easier of application in conversion cases than in others, unless every act of gross neglect in the caring for property being transported should be held to amount to conversion. If this is held, then the limitation of liability could be held to apply only to cases of ordinary negligence, a question finally for the Federal Supreme Court to determine when the limitation is as to an interstate shipment.

VICTIMS OF CRIMINAL ACTS AS POSSIBLE ACCOMPLICES OR CONSPIRATORS.

View that Victim May be Conspirator.—A recent opinion by the Supreme Court of the United States, concurred in by six of the eight sitting members and dissented from by Mr. Justice Lamar and Mr. Justice Day, seems to me to support a rule quite important in the administration of criminal law.[1] This rule, if carried to its logical end, would make all persons, whom the primary purpose of criminal statutes is to protect, under police power in its effort to guard public morality or other public interest, accomplices or conspirators, according merely to their individual capacity to commit crime, though the theory of such statutes be, that they are merely the victims of criminal acts denounced thereby.

This case showed an indictment against a woman for a conspiracy with another, for him to cause her to be transported from one state to another for the purpose of prostitution, in other words, a conspiracy between them to violate what is known as the Mann Act. The trial court sustained a demurrer to the indictment on the ground that, though the offense could not be committed without her, she was no party to it, but only the victim. This ruling is reversed on writ of error by the United States.

We might here observe that, if the woman could participate in any violation of the Mann Act by consenting to her own transportation in interstate commerce, Congress ought to have embraced her in its provisions. That it did not do so warrants the conclusion that Congress intended, as matter of law, that she was to be regarded as an inanimate article in interstate commerce. Why she should be regarded as otherwise in overt acts (for the Federal conspiracy section requires overt acts) in a conspiracy to accomplish such transportation, it is difficult to discern.

(1) United States v. Holte, 36 Sup. Ct. 271.

We may say here, also, that ordinarily conspiracy in American law differs from conspiracy at common law, in the requirement of proof of overt acts. In this country a man may think what he pleases, so long as he gives no voice to his thoughts, and under the doctrine of free speech, generally, he may only make himself liable or culpable for its abuse.

But to return to the case above cited we find that Mr. Justice Holmes cites many cases to the effect that there may be conspiracy by one to accomplish a crime which he may commit himself, but plainly these cases do not apply to a woman conspirator with regard to her own transportation under the Mann Act. She is not denounced thereby. Neither does it seem to me are cases cited by him which refer to cases of conspiracy by one to accomplish what he is free or not to do. In point of concept the theory of law is, that consent to do an act has no bearing on its being done. But there are other cases which do appear to be relevant, and these I will notice.

Thus, there are cited many cases to the proposition that, "a woman may conspire to procure an abortion upon herself when, under the law, she could not be an accomplice." There are three cases cited, one English and two American cases. The first[2] of these cases shows a conviction of a woman and two others for conspiring to commit an abortion upon the woman, all of them believing she was pregnant when, as a matter of fact, she was not so. The conviction was upheld, but no consideration was given to the fact of the woman being a victim, one of the judges saying: "I cannot entertain the slightest doubt that if three persons combine to commit a felony they are all guilty of conspiracy, although the person on whom the offense was intended to be committed could not, if she stood alone, be guilty of the intended offense."

(2) Reg. v. Whitchurch, L. R., Q. B. Div. 420, 8 Am. Cr. Rep. 1.

As a general proposition this might be true, as for example, where a man conspired with others to engage in a riot or insurrection. This case, as reported in 8 American Criminal Reports, *supra*, is followed by a note, which says: *"Accomplice to an abortion.* It is doubtful whether the doctrine of Reg. v. Whitchurch would be fully accepted in this country; because it is held by many respected authorities here that the woman upon whom an abortion is committed is not an accomplice, which view would seem to militate against the doctrine laid down in the foregoing case. For instance, it is held in Kentucky that the law looked upon her rather as a victim than as a co-offender. Peoples v. Commonwealth, 87 Ky. 487, 9 S. W. 509. The same view was taken in Dunn v. People, 29 N. Y. 523; Com. v. Wood, 11 Gray 85; State v. Owens, 22 Minn. 238; State v. Hyer, 39 N. J. L. 598.

It is to be noticed in the excerpt taken *supra* from the opinion of Mr. Justice Holmes that he deduces that because "a woman may conspire," etc., *therefore*, she "could not be an accomplice," while the note I quote deduces that because she could not be an accomplice, *therefore* she could not be a conspirator. I think not many will agree with the learned Justice.

In one[3] of the American cases, the question was, whether the acts and declarations of a woman, who lost her life in the performance of an abortion, which she aided in bringing about, were admissible in a prosecution for manslaughter against the persons performing the abortion.

The court, after referring to New York and Massachusetts decision that she was not an accomplice, but "rather the victim of the act," said: "But it is not necessary that she should appear to be an accomplice in order to make her declarations accompanying acts done in furtherance of the criminal purpose evidence against another, who has joined in the unlawful act. She may be, and usually is, a party to the illegal combination to effect the abortion, and as this is the ground upon which the declarations are admitted, it can make no difference that she is not criminally liable for the act done. In some cases, probably, the woman is an unwilling subject, submitting to, but not actively joining in, the unlawful attempt, and in such cases the community of purpose, which alone can make the acts and declarations of one admissible as evidence against his associate in crime, may be wanting."

This case seems to me to be rather opposed to, than supporting, the proposition, to which it is cited. The court concedes she is the victim so far as her own safety is involved, but as the policy of law is intended to accomplish only this much, its benefits are not to be carried over to the protection of others. It is to be noted, also, that this case rejects the proposition that one, who may be a conspirator, cannot be an accomplice.

In the other American case[4] the learned Justice cites, there was a prosecution for murder. The question was the same as in the Solander case, and ruled the same way. The court construing the abortion statute of Iowa, said: "This language indicates the design of the law-makers to treat the woman upon whom the act is perpetrated as the victim, and she cannot be guilty of this crime. This is in harmony with the conclusion reached by courts generally, and she is not to be regarded as an accessory or accomplice (many cases are here cited)." The court then relies on the Solander case and quotes therefrom as follows: "If the woman is not technically an accomplice, she may, nevertheless, conspire with

(3) Golander v. People, 2 Colo. 48, 63.

(4) State v. Crofford, 133 Iowa 478, 480, 110 N. W. 921.

others to produce the abortion, and, conspiracy being shown, her acts and declarations in furtherance of the common design are evidence against others engaged with her in the criminal act." But it was said above, in effect, that it was no "criminal act" on her part, and when the woman is spoken of as conspiring with others, it does not call it criminally conspiring as to her, though it would be as to the other or others. The abortion being a lawful act as to her and an unlawful act as to them, it would be lawful for her to conspire, and unlawful for them.

The learned Justice cites other cases to the proposition that "a conspiracy with an officer or employes of the Government or any other, for an offense that only he could commit" may be prosecuted for. But why consider these cases, for by no stretch of thought may they be supposed to relate to victims. In this case the learned Justice says: "We see equally little reason for not treating the preliminary agreement as a conspiracy that the law can reach, if we abandon the illusion that the woman always is the victim." This seems to admit, that in cases where the woman is the victim, conspiracy would not exist, but, if, as matter of law, she is treated as the Iowa case, *supra,* says "as the victim," there would seem to be an irrebuttable presumption that she is such.

View that Victim May Not Conspire.—Mr. Justice Lamar cites many cases to the proposition that in abortion cases "the law regards her (the woman in the case) as the victim rather than the perpetrator," and as "*contra apparently* in England and Colorado" he cites two of the cases cited by Mr. Justice Holmes. He also said, in effect, that cases barring her from being considered an accomplice were analogous in principle on the question of her not being considered a conspirator. We have seen that the Iowa court said she neither could be deemed "accessory or accomplice."

In one[5] of the cases he cites, the prosecution was for advising and procuring an abortion, and the question as to the necessity of corroborating the female as an accomplice. The court said: "She did not stand legally in the situation of an accomplice; for, although she no doubt participated in the moral offense imputed to the defendant, she could not have been indicted for that offense. The law regards her as the victim rather than the perpetrator of the crime." This language seems to make the law regard *every* female on whom such a crime is perpetrated as the victim, for how otherwise could she have "participated in the moral offense?"

And thus a New Jersey case,[6] in holding the female not to be an accomplice, the court said: "While a pregnant woman who willfully takes medicine to produce an abortion upon herself is not an accomplice of the party who advises her to take it, yet her moral implication is a proper matter to be considered in weighing her testimony."[7] And the same may be said as to Georgia Supreme Court,[8] which said: "A participant in an offense, however morally guilty he may be, whose connection with the forbidden transaction does not render him liable to an indictment therefor, is not an accomplice."

The principle, therefore, of one not being an accomplice might not rest entirely upon one being a victim, and as to such cases, it is conceivable there might be a distinction so far as conspiracy is concerned, to commit a forbidden act. But there are cases of this kind which show by the very framing of statutes that no other than their violators were to be pun-

(5) Dunn v. People, 29 N. Y. 523, 86 Am. Dec. 319.

(6) State v. Hyer, 39 N. J. L. 598.

(7) See also Com. v. Wood, 11 Gray (Mass.), 85; State v. Owens, 22 Minn. 238, 244.

(8) Keller v. State, 102 Ga. 506, 511, 31 S. E. 92.

ished. Thus, a Massachusetts case,[9] where one was indicted for inducing a seller of liquor to commit a crime. It was said: "The statute imposes a penalty upon any person who shall sell. * * * Now, if it were intended that the purchaser should be subjected to any penalty, it is to be presumed that it would have been declared in the statute." Can a general conspiracy statute override the lack of intent by the legislature in this regard?

But an English case,[10] decided since the decision in Reg. v. Whitchurch, *supra*, appears strong authority the other way, if that case meant to say the woman in an abortion case was not to be regarded as the victim. The Tyrrell case shows that a girl under fifteen years of age was prosecuted for inciting a man to commit adultery. This prosecution was under a law which provided that: "A person who counsels, procures or commands another to commit either a felony or a misdemeanor, is guilty of the misdemeanor of incitement, if the offense suggested is not committed, and if it is committed, he is an accessory before the fact if the offense is felony, and a principal if the offense is either treason or a misdemeanor." Here it is perceived there is no age limit, but anyone can be held who is *capax doli*. But the court said the conviction must be quashed, because as to the offense suggested "there is no trace anywhere in the Act of any intention on the part of the Legislature to deal with the woman as a criminal," and "what was intended by the Legislature was to protect girls against themselves, and it cannot be said that an Act which says nothing about the girl inciting or anything of that kind, and the whole object of which is to protect women against men, is to be construed so as to render a girl against whom an offense is committed equally liable with the man by whom the offense is committed." The Mann Act, unless we may ascribe police power to the Federal Government, may be said not to treat the woman as the victim. But if it does not, it treats her like a bale of merchandise in transportation. If she is such in transportation, she ought to be such in preparation for the journey. However, it has been ruled that police power justifies this law.[11]

Conclusion.—I think that policy of the decision I have been discussing is bad, because it tends to render abortive the operation of the statute. In the first place, it places the woman where she may plead her privilege against self-incrimination in a very forcible way. If, as contended by a great many, the Mann Act is principally aimed at commercialized vice, it is apparent that Mr. Justice Holmes' observation about ridding ourselves of the illusion that all women are victims, has less place than it otherwise might be supposed to have. In the second place, even as to women not willingly participating in the moral offense, it enables defendants in the substantive case to frighten them away from testifying and even tends to make them aid, by concealment, in the non-prosecution of offenses. In other words, it is a strong argument in the complete emasculation of the law. It pretends to protect women, and this ruling makes it only a protection for a particular kind of women, and those, presumably, very negligible in number. As to all women, it makes them either accessories before the fact or accessories after the fact.

But it also seems opposed to legal principle in this, it does not fit any definition of conspiracy with which I am acquainted. It is said that description of criminal conspiracy which has the widest recognition is a combination between two or more persons for the purpose of accomplishing a criminal or unlawful object,

(9) Com. v. Willard, 22 Pick. 476, 479.

(10) Reg. v. Tyrrell (1894), 1 Q. B. 711, 70 L. T. N. S. 41.

(11) Hoke v. U. S., 227 U. S. 308, 76 Cent. L. J. 261, 77 id. 261.

or of an object neither criminal nor unlawful by criminal or unlawful means. I take it that the first clause means that unless the object to be accomplished is unlawful or criminal for the person conspiring to do, then it cannot be an unlawful or criminal object for him to seek to attain, though it may be unlawful or criminal for another to so seek. And this is especially true when in the doing of what is aimed at, such person is supposed, as matter of law, to be acting as the victim of the party with whom he or she conspires. Let me illustrate this if I can. We will suppose the female conspires with the man who is to transport her in interstate commerce. If she is the victim in the substantive offense, presumably she is the victim in arrangement to accomplish it. Now, suppose two women conspire with each other to get some man or some men to transport one or both of them. They would not be victims in such case, for they are not arranging with the males, who, in law, are supposed to make them their victims. This would be an independent act.

Let us take the other part of the definition and can it be said that merely arranging with the male is a criminal or unlawful means, when there is no coercion or duress upon him by her, even if it were permitted to regard her as having the power to coerce? If she arranges with him herself, is not her act robbed of the same free will as when she is actually transported, that is to say, when she is his victim?

There is in the actual transportation and arrangement therefor the same quality of unrecognized consent in law. The two are one continuous act and not separable into parts.

It has been ruled that an agreement between a male and a female to commit adultery is not a conspiracy to commit a misdemeanor.[12] The first-named case said it knew of no authority that it was, nor that it had ever before been asserted except in the latter case, and there "it received unqualified disapprobation." But if this is so, how may it be said that an agreement for transportation for the purpose of prostitution may be called a conspiracy?

It was said that a ruling that it did constitute conspiracy would take away all *locus penitentiae* in such an agreement. But if a female is transported for immoral purposes and is the victim in such transportation, the rule of overt acts in conspiracy could not apply, because the victim may not commit an overt act wherein she is a victim. This would be to say the act of one *non compos mentis* is to be shown as an overt act merely because that was what was intended to be accomplished. Therefore, though it might be admitted, for the sake of argument, that in entering into the agreement for her transportation, the female is not a victim, yet if the overt act occurs when she is a victim, it cannot be shown against her, unless you also say, that, though her own act cannot be shown, yet his may. But conspiracy, that is provable only by overt acts being shown, ought to date from the time of the first overt act. The first overt act in a matter of this kind is the transportation.

The question I have been discussing would seem to affect not merely such offenses as are under the Mann Act, but also conspiracy in regard to all offenses in carnal intercourse with females under the age of consent. As to those, the case of Reg. v. Tyrrell, *supra*, is especially pertinent.

I have not been able to cite but one case wherein a supposed victim was prosecuted for conspiracy, and in that there was no discussion as to whether or not she was to be deemed a victim. To this I oppose the Tyrrel case, which holds that a victim in the substantive case cannot be immediately proceeded against.

(12) Miles v. State, 58 Ala. 390; Shannon v. Com., 14 Pa. St. 226.

This is closely analogous. And I think I have shown that accessory and accomplice cases should be deemed analogous. They decide universally that a victim cannot be an accessory nor an accomplice.

N. C. COLLIER.

St. Louis, Mo.

WILLS — DECLARATIONS OF TESTATOR.

BARFIELD et al. v. CARR, et al.

Supreme Court of North Carolina. Oct. 6, 1915.

86 S. E. 498.

Statements made by a testator after the execution of his will, to the effect that he intended to strike out the names of the defendants so that they would not share in his estate, were admissible on the question of partial revocation.

This is a civil action, tried at February term, 1915, Superior Court of Greene county, Connor, Judge, upon these issues:

(1) Did A. R. Hinson draw the pen lines through the names of Lillian Phillips, Alex Hagan, and Minnie Taylor, and through the words giving to each one share, as appears in Item 6 of his last will and testament, as alleged? Answer: Yes.

(2) If so, did the said A. R. Hinson draw said lines through said names and words with intent to cancel or obliterate so much of said will as gave to Lillian Phillips, Alex Hagan, and Minnie Taylor to each one share of his estate? Answer: Yes.

(3) Did A. R. Hinson draw the pen lines through the words "of my nephew, Will Hinson, one share," as appears in Item 6 of his last will and testament, as alleged? Answer: Yes.

(4) If so, did the said A. R. Hinson draw said lines through said words with intent to cancel or obliterate so much of said will as gave to Hannah Hinson one share of his estate? Answer: Yes.

From the judgment rendered, the defendants appealed.

Albion Dunn and W. F. Evans, both of Greenville, and J. Paul Frizzelle, of Snow Hill, for appellants. Jarvis & Wooten, of Greenville, for appellees.

BROWN, J. This action is brought to determine the rights of plaintiffs and defendants under the will of Adam Hinson. The will was found soon after testator's death, the sixth item being canceled and obliterated in part as follows:

"6. It is my will and desire that all the residue of my property, after the sale of the real estate provided in above section, shall be divided equally and paid over, share and share alike, to each of the following, to-wit:

"To my niece Elizabeth Barfield one share.

"To my niece Lillian Phillips one share.*

A. R. Hinson

"To my nephew Alex. Hagan, one share.*

"To my niece Sunie Hinson one share.

"To my niece Dicie Hinson one share.

"To my niece Hannah Hinson, the wife of my nephew Will Hinson, one share.*

A. R. Hinson

"To my niece Minnie Taylor one share.*

"To my niece Matilda Barfield one share."

It was admitted by all parties that the will was duly executed by A. R. Hinson, and that the lines drawn through the words in the sixth item of the will were made after the said testator signed and executed the will. It was also admitted that Sunie Hinson, one of the devisees, died during the lifetime of the testator. This action was brought by the plaintiffs against Hannah Hinson and the defendants whose names appear to have been canceled, in which they set up that they were entitled to the entire proceeds of the estate devised under Item 6 of the will, and ask for an interpretation of the will.

[1] The defendants deny the cancellations of the legacies to them was the act of the testator, or that he intended to revoke them, and they further contend that, in any event, if revoked, those shares would not go into the residuum, but claim that as to those the testor died intestate. It is well settled that there may be a partial revocation of a will by canceling, tearing, etc., as to material parts. In re Wellborn's Will, 165 N. C. 636, 81 S. E. 1023; Cutler v. Cutler, 130 N. C. 1, 40 S. E. 689, 57 L. R. A. 209, 89 Am. St. Rep. 854. To constitute an effective revocation there must appear some manifest act or symbol of destruction, and then there must appear the intention of the testator to revoke.

[2] In the case at bar the jury have found both the act and the intention. In submitting those issues the court properly put the burden on plaintiffs upon each issue, and in every respect the charge is free from error, and is a clear presentation of the case to the jury.

*Star indicates lines alleged to have been penciled out.

There are only two assignments of error on this appeal that we deem it necessary to discuss:

[3] 1. The court permitted the introduction of witnesses who testified as to conversations with testator after his will was executed, in which he told these witnesses that he meant to strike out of his will the names of these defendants and to see that they did not share in his estate. The admissibility of such evidence is fully discussed in Re Shelton's Will, 143 N. C. 221, 55 S. E. 705, 10 Ann. Cas. 531, cited and approved in Re Wellborn, supra, and its competency upheld. Those cases follow Reel v. Reel, 8 N. C. 248, 9 Am. Dec. 632, in which it is said by Chief Justice Henderson:

"To our minds, to reject the declarations of the only person having a vested interest and who was interested to declare the truth, whose fiat gave existence to the will, and whose fiat could destroy, and in doing the one or the other could interfere with the rights of no one, involves almost an absurdity; and (with due deference to the opinions of those who have decided to the contrary, we say it) they are received, not upon the grounds of their being a party of the res gestae, for whether they accompany an act or not, whether made long before or long after making the will, is entirely immaterial as to their competency; those circumstances only go to their weight or credit with the tribunal which is to try the fact, and the same tribunal is also to decide whether the declarations contain the truth or are deceptive, in order to delude expectants and procure peace."

See, also, 3 Wigmore on Ev., § 1738.

[4] 2. The other question we will consider relates to the disposition the law makes of the legacies revoked by cancellation and the one that lapsed by the death of the legatee during the lifetime of the testator. We are of opinion that such legacies fall into the residuum and go to the residuary legatees, under § 3142, Rev., which reads as follows:

"Unless a contrary intention shall appear by the will such real estate or interest therein, as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or become void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will."

The point is expressly decided in Duckworth v. Jordan, 138 N. C. 525, 51 S. E. 109; Saunders v. Saunders, 108 N. C. 327, 12 S. E. 909; Battle v. Lewis, 148 N. C. 142, 61 S. E. 634.

No error.

NOTE.—*Declarations of Testator to Explain Any Latent Ambiguity in a Will.*—We think that as to any declarations by a testator offered to contradict the plain terms of a will, whether they be made before, at the time of or after the execution of a will, the principle that the law requires that a will be in writing is sufficient for their exclusion. Wood v. Hammond, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198; Comfort v. Matthes, 2 Watts & S. (Pa.) 450, 37 Am. Dec. 523; Re Lester, 115 Iowa 1, 87 N. W. 654; Chenault v. Chenault, 88 Ky. 83, 9 S. W. 775, 11 S. W. 424; Peet v. Commerce & E. St. R. Co., 70 Tex. 522, 8 S. W. 203.

But the question whether such declarations may be admitted to explain a latent ambiguity in a will brings into view this quality of hearsay evidence as or not being under the rule of exclusion.

In Bradley v. Rees, 113 Ill. 327, 55 Am. Rep. 422, it appears that testator had seven sons, four of them minors. He devised the remaining lands owned by him to the "four boys." The court said: "In such case, the circumstances under which the words were used may be proven. * * * In addition to the facts above referred to, it is made apparent from the instructions given by the testator to the scrivener and from the repeated declarations of the testator, both before and after the making of the will * * * that by the words 'the four boys' the testator meant his four sons who were then minors and living with him as a part of his family."

In So. New Market Methodist Seminary v. Peaslee, 15 N. H. 317, there was question of identifying a beneficiary in a will, and it was ruled that as there was only one public school at New Market, the claimant was entitled to take. As to declarations made by the testator, it was said: "As to the evidence of the testator's declarations at the time of the making of the will, the authorities are that they are admissible to show who he meant by the description in the devise. * * * But declarations made after or before the time of making the will are said to be incompetent. But it is unnecessary to settle the point in this case."

In McLeod v. Jones, 159 N. C. 74, 74 S. E. 733, it is said that where there is a latent ambiguity in a will that "the surrounding circumstances as well as the declarations of the testator are relevant to the inquiry, and especially where, as in this case, they were made at the time the will was executed."

It was held in re Wheeler, 52 N. Y. Supp. 943, 32 App. Div. 183, that the declarations may be made before or at the time of the execution of the will, nothing being said as to subsequent declarations. But it was held by another New York case that subsequent declarations stand on the same footing. Gallup v. Wright, 61 How. Pr. 286. New York courts, however, under the rule that hearsay evidence is not admissible to prove a specific fact, hold that evidence that declarations by a testator that he did not make a certain will are not evidence. Morton v. Morton, 83 N. Y. Supp. 726, 86 App. Div. 527. And yet it has been argued, that such a rule in its limitations

is not a technical rule. Upon this subject see also Throckmorton v. Holt, 180 U. S. 552, 45 L. ed. 663, 21 Sup. Ct. 474.

But it was held in an Iowa case that declaration of a deceased upon examination of an instrument and the signatures thereto that the paper was his will was competent evidence, the subscribing witnesses being dead. Scott v. Hawk, 105 Iowa 467, 75 N. W. 363. It certainly would be strange, if a subscribing witness were to dispute his signature to refuse a declaration by the testator that it was. This would put testators at the mercy of subscribing witnesses.

As relating to the question of ambiguity, it has been held that the tearing of a will, that is, by cutting away the signature from a codicil in such a way as to mutilate the will itself, declarations by the testator made in the doing of this are admissible as part of the *res gestae*. Burton v. Wylde, 261 Ill. 397, 103 N. E. 976. There is quite a full discussion of authorities in this case with considerable citation of authority.

In Schnable v. Henderson, Tex. Ct. Civ. App., 152 S. W. 23, the question was as to admissibility of declarations by testator at the time of cutting out a clause in his will and declarations made afterward as to his intent in so doing and they were held admissible under Texas ruling in McElroy v. Phink, 97 Tex. 147, 76 S. W. 753, 77 S. W. 1025.

The cases generally may be said to illustrate the principle, that ambiguities in wills may be explained by declarations of testator and that intent in his acts, which may mean one thing or another also may be. While the latter may not be said to be hearsay evidence of a specific fact, yet it would seem that as a fact may depend altogether on the intent with which it is done, there is only a shade in distinction between showing intent and showing the specific fact itself. C.

ITEMS OF PROFESSIONAL INTEREST.

NOTES OF RECENT DECISIONS IN THE BRITISH COURTS.

Each court develops a system of pleading of its own and therefore as a general rule, we have not hitherto referred in this column to decisions of the courts on this side regarding questions of practice or the rules of advocacy; these being peculiar to their own jurisdictions, and not likely to be of much assistance outside of them. The House of Lords have, however, lately given a ruling with regard to the pleading of *veritas* in slander actions which perhaps may be usefully noted here. The alleged libel arose out of a statement said to have been made about the arrest of the plaintiff on a charge of fraud and regarding other things about him. This statement the plaintiff innuendoed as meaning in substance, first, that the acts referred to were dishonestly done; and, second, that he, the plaintiff, was a man of dishonest character and unfit to be a director. In defense the defendants gave particulars of other acts besides those referred to in connection with the arrest, by which they sought to establish that the plaintiff was a man of dishonest character and unfit to be a director by reason of the various things he had done or that had occurred to him. The plantiff claimed to have these allegations struck out of the pleadings as irrelevant, but the court refused a motion to that effect, and allowed defendants' averments to stand, for the plaintiff himself had construed the libel as inferring that he was a dishonest person, and the defendants were quite entitled to give particulars to show why they said that he was dishonest. In fact, some of the judges indicated that not only were the averments relevant, but they were even necessary in pleading *veritas* as against a general charge of dishonesty. "If," said Phillimone, L. I., "the libel says of a plaintiff, "'you did one specific act, you stole a hatchet,' it is fair enough justification to say those words are true in their natural and ordinary meaning, 'you did steal it.' But if the allegation in the libel is an allegation of conduct or life or character, or the converse thing, then it is not enough to say the words are true; you have got to say that the words are true because the plaintiff has done so and so. If the imputation is that the plaintiff is a thief, you have got to say it is true that he is a thief because he stole on this or that or the other occasion, or tried to steal on this or that or the other occasion, and was only prevented by main force or something of that kind."

A very interesting series of decisions have been given on the application of the Workmen's Compensation Act to sailors who, when ashore on leave, happen to meet with accident. Does such an accident arise out of and in course of the employment, so as to entitle the man to compensation? The first British compensation law did not apply to seamen at all, they were brought in when the law was extended and amended in 1906. Then the peculiarity of their employment and the infinite variety of risk to which it gives rise began to be realized; and the courts were specially perplexed regarding the position of men on leave, till Lord Justice Fletcher Moulton, in Kitchenham v. Owners of S. S. Johanesburg, 1911, A. C. 417, struck out a principle which cleared away many difficulties, and has since been widely approved and followed. Briefly, it is this, a sailor on shore with leave, is in the course of his employment, but should he meet with an accident, e. g., tripping on the street, or being hit by falling slates, that is not an accident arising out of the employment; such an accident is a general risk

of any and every pedestrian. An accident only arises out of the sailor's employment when he gets back onto his ship or does something that specifically connects him with his ship. Thus even though he gets so near the ship as the quay and then falls off the quay edge into the water, that is not an accident arising out of his employment; it might have occurred to anyone walking on the quay; but should he reach the gangway and sustain injury in trying to board the ship, or on the ship after he gets on board, that is an accident arising both out of and in course of the employment and entitling to compensation.

There have been many applications of the rule laid down in Kitchenham's case, but like all other general directions, it does not suit every case. In Cook v. Owners of S. S. Montreal (1915), 102 L. T. R. 164, the ship was moored to a dolphin connected with the quay by means of a permanent bridge. The dolphin was not railed and was badly lighted. A seaman leaving the ship got on the dolphin but fell between it and the quay and was badly drowned. It was held by the court of appeal that the accident did not arise out of the employment, for the dolphin was as much a part of the land as the quay itself, and therefore having reached it, the man was disconnected from his employment and the accident could not arise out of it. That decision certainly seems a strict, even pedantic application of an otherwise useful principle, and that observation regarding it is borne out by the fact that in a still later case on the same subject the House of Lords while not disapproving the decision in Cook's case, yet seem to have felt that it was time to call a halt to further narrow interpretations of the statute so far as regards seamen. This they did in Webber v. Wansborough Coy, Ltd., 52 S. L. R. 859. There a sailor leaving the ship on which he had been employed during the day crossed a plank connecting the ship with a permanent iron ladder fixed on the quay, and slipped and hurt himself while climbing the ladder. It was held that the accident arose out of and in course of the employment, and compensation was awarded. We quote a dictum of Lord Justice Buckley, which, in our opinion, suitably supplements the rule in Kitchenham's case. "In the obligations contractually existing between master and servant, it is part of the duty of the master to afford the workman when he is dismissed, reasonable facilities for leaving the place of employment, and if the servant is injured while availing himself of those facilities, the master may be liable."

A point of law which somehow or other has got into a state of much confusion is, whether the usual clause in agreements providing for a named sum being paid in the event of breach, is a penalty which the court may restrict to the amount of the actual damage sustained; or is liquidated damages and recoverable right away without proof of what damage has exactly been incurred. One of the House of Lords judges has attempted lately in Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co., 52 S. L. R. 861, to reduce the preceding decisions to some line of order; and he deduces from them two principles which we take it will be used as the canons of interpretation for future agreements containing such clauses—first, the in itself conclusive, and second, when a sum is named, no matter in what phraseology, the presumption is that it is a penalty, but that presumption may be rebutted, by showing that the damage is capable of pre-estimation, and assertion in the agreement that a sum is payable as penalty or as liquidated damages is not that there was a genuine covenanted pre-estimate of damage among the parties to the agreement

DONALD MACKAY.

Glasgow, Scotland.

BOOK REVIEWS.

LIMITATIONS ON TREATY MAKING POWER.

This work refers to checks in our Constitution upon the power of the Senate in the making of treaties by our government with foreign nations. It has nothing to do with the power to make treaties under international law.

So that the checks of which we speak may be readily understood, the author of this work, Mr. Henry St. George Tucker, editor of Tucker on the Constitution, approaches this question by giving the views of authors and statesmen on the treaty-making power under our Constitution and he follows this up with consideration of Supreme Court cases with textual discussion thereof and he considers also the police power of the states and the right of Congress to trench thereon in the making of treaties. The work is a splendid exposition of the subject treated and many of the cases referred to contain principles announced in other relations than those arising out of treaty, but which must be thought to exist independently of and even if conflicting with treaty rights.

The volume is gotten up in attractive form, is bound in cloth and comes from the publish-

ing house of Little, Brown & Company, Boston, 1915.

WIGMORE ON EVIDENCE—SUPPLEMENT TO SECOND EDITION—PREFACE.

The Supplement to the treatise on the System of Evidence in trials at common law consists of elaborate notes to the various sections of the original work. Many of these notes are quite full and instructive and this Supplement adds greatly to the value of this classic on the law of evidence by Prof. John H. Wigmore, professor of the law of evidence in the law school of Northwestern University at Chicago.

The activities of Prof. Wigmore in so varied fields of law-writing has placed him well in the forefront of legal writers in this country and his fame as a philosophical student has become not only national but world-wide.

The trend of his mind is exemplified in the Preface to this Supplement wherein he comments on the merits of our law of evidence, pointing out its inherent defects and acknowledging its many benefits as founded on experience and the dictates of human nature. He discourses therein quite forcibly on the inability of counsel, through lack of knowledge, to apply rules of evidence intelligently and he arraigns quite severely our appellate courts for their magnifying the importance of departures by trial courts in applying the rules of evidence Among other things he praises the hearsay rule as a good administrative rule for the protection of juries, but claims that in such tribunals as the Interstate Commerce Commission its rigidity ought to be dispensed with.

If this exception may be recognized in this day of commissions working out practical results in so many lines of endeavor, we will have achieved great results.

He also believes trial courts should be given more power in directing trials than they have, and their discretion greatly enlarged in applying the rules of evidence to the end that these rules should not prove obstructions rather than aids towards the attaining by verdicts of correct results. This Supplement comes from the well-known publishing house of Little, Brown & Company, Boston, 1915.

HUMOR OF THE LAW.

The stonemason was on the witness stand describing the way in which he had been assaulted by the defendant. "He walked right into my yard," the witness said, "and slammed me up against one of my own tombstones."

"Did he hurt you?" inquired the court.

"Hurt me! Why, I've got 'Sacred to the memory of' stamped all down my back."

"What do you know of the character of the defendant?" the judge asked a negro "washerwoman" subpoenaed in an accident case. A white man had been arrested for careless driving of a second-hand Ford car.

"Hits tollable," Miranda said.

"Have you ever seen him drive his car before?"

"Yas, sah."

"Would you consider him careless."

"Well, Jedge, ez fer de car,—dat little thing ain't gwinter hurt nobuddy, but being us is all here, I might ez well tell yo dat he sho' is keerless 'bout paying fo' his wash!"

Said a lawyer to his better half, "There's a curious thing about that new case I filed in the Circuit Court yesterday. The number is 90,999."

Her comment will be appreciated by members of the bar:

"My goodness, will they ever get to you?"

In England they tell of a Scottish advocate who, in a pleading, had several times pronounced the word "enough" as if it were "enow."

"Mr. McIntosh," the judge, remarked at length, "you should sound the 'ough' as 'uff'—'enuff,' not 'enow.'"

"Verra weel, ma lord," continued the self-possessed pleader, "of this we have said enuff; and I come, ma lord, to the subdivision of the land in dispute. It was apportioned, ma lord, into what, in some parts, including England, would be called pluffland—a pluffland being as much land as a pluffman could pluff in one day, and pluffmen—"

But his lordship could not withstand the ready repartee, and burst into a laugh, saying:

"Pray proceed, Mr. McIntosh, we know 'enow' of the Scottish language to understand your argument."

An amusing story is told of how Lord Coleridge once turned his wit for the benefit of a confused young barrister.

The latter had called the attention of a witness to two contradictions in his testimony, one of which his own counsel proved to be no contradiction at all.

The youthful barrister grew crimson with mortification, but Lord Coleridge, noting his embarrassment, said kindly:

"Never mind, sir; one of your barrels has missed fire, it seems, but the other has taken effect."

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the Webb Pub. Co., St. Paul, Minn.

1. **Arbitration and Award**—Presence of Parties.—A party to an award of arbitrators need not be present when the award is made, and his absence does not estop him from attacking the correctness thereof.—Black v. Woodruff, Ala., 69 So. 97.

2. **Attorney and Client**—Compromise by Client.—Client's compromise and settlement of claim against railroad held a discharge of the railroad, so that attorney who had taken the claim on a percentage, could not recover such percentage from it.—New Orleans & N. E. R. Co. v. Tally & Mayson, Miss., 69 So. 186.

3. **Bills and Notes**—Alteration.—Where a draft bore on its face evidence of alterations, the bank which receives it is chargeable with notice of facts which inquiry would have elicited, and if it belonged to a county the bank may be held liable for conversion.—Hooten v. State, Ark., 178 S. W. 310.

4.——Directors.—The directors of a corporation, who were also its sole stockholders, and who indorsed a note to be used as collateral security to procure a loan for the corporation, are liable as indorsers, and not as sureties.—Mercantile Trust Co. v. Donk, Mo., 178 S. W. 113.

5.——Forgery.—The transferee of a bank check does not become a holder thereof in due course where the indorsement was forged.—Miners' & Merchants' Bank v. St. Louis Smelting & Refining Co., Mo. App., 178 S. W. 211.

6.——Original Promise.—One not the payee of a note, who signs his name on the back thereof before delivery without words to express the nature of his undertaking, is an original promissor or surety.—Brooks v. Stevens, Tex. Civ. App. 178 S. W. 30.

7.——Payment.—A person paying a negotiable note should require presentation before making payment, since otherwise the payment is at his risk.—Hayden v. Speakman, N. M., 150 Pac. 292.

8. **Bankruptcy**—Composition.—Under Bankr. Act, §§ 12e, 13, 14c, 57n, 63b, 70f, a judgment liquidating claim not proved and filed within the statutory time is barred, where there has been confirmation of a composition, and the bankrupt is entitled to return of securities deposited as part of an offer of composition.—In re Maytag-Mason Motor Co., U. S. D. C., 223 Fed. 684.

9.——Fraud.—Under Bankr. Act, § 70, a trustee in bankruptcy of a corporation may not recover corporate funds used to pay for purchase of stock without showing that the payment was in fraud of creditors.—Coleman v. Dana, Mo. App., 178 S. W. 256.

10.——Provable Claim.—A provision in bonds of a bankrupt corporation giving holders a contingent right to share in surplus at maturity of the bonds held not to defeat their right to prove as general creditors.—In re Interborough Realty Co., U. S. C. C. A., 223 Fed. 646.

11.——Quieting Title.—Where a trustee in bankruptcy seeks to quiet title to land the bankrupt had contracted to purchase, the vendor is entitled to a lien for the balance of the purchase price with the agreed interest.—Whalen v. Wolford, Kan., 150 Pac. 608.

12. **Banks and Banking**—Forgery.—A bank which cashed a check payable to the order of a named payee, presented and indorsed by another than the payee, cannot recover the amount from the drawer.—Miners' & Merchants' Bank v. St. Louis Smelting & Refining Co., Mo. App., 178 S. W. 211.

13.——Savings Account.—A bank teller need not ascertain whether the drawer of a commercial check has a savings account, where he has no commercial account, presents no passbook, nor gives notice that the check is to apply on the savings account.—Hartford v. All Night and Day Bank, Cal., 150 Pac. 356.

14. **Carriers of Goods**—Action.—Where consignee and buyer of bale of cotton settled with the consignor for a certain bale as if it had been delivered, neither the consignor nor his assignee had any interest in the bale as against the carrier on which to base an action for its loss.—Southern Ry. Co. v. Brewster, Ala., 69 So. 111.

15.——Bill of Lading.—The pledgee of a bill of lading is the proper party plaintiff for conversion of the shipment by the carrier.—People's State Savings Bank v. Missouri, K. & T. Ry. Co., Mo. App., 178 S. W. 292.

16.——Connecting Carrier.—Switching service as between railroad companies is usually reciprocal, and a company, which has hauled a car of high-class freight to the end of its road, cannot require a connecting carrier to continue the haul as a switching movement at a fixed price, without regard to the contents of the

car.—Vicksburg, S. & P. Ry. Co. v. Railroad Commission of Louisiana, La., 69 So. 161.

17.——Conversion.—There was a conversion of shipment of horses by carriers where they changed the consignment from one to the order of "M (the shipper), notify C," to a straight consignment to C.—People's State Savings Bank v. Missouri, K. & T. Ry. Co., Mo. App., 178 S. W. 292.

18.——Rates.—Passengers and shippers, including the state in its private capacity, after determination of the validity of state statutes fixing rates for intrastate transportation by rail, in proper actions could recover excessive charges exacted pending determination.—State ex rel. Barker v. Chicago & A. R. Co., Mo., 178 S. W. 129.

19.——Tender.—The consignee is not required to tender freight charges in advance of a demand that a "solid" car be so placed as to make its unloading practicable.—Southern Ry. Co. v. Morgan, Ga. App., 85 S. E. 933.

20. **Carriers of Passengers**—Contributory Negligence.—Whether a passenger about 14 years old, jumping from a train as it approached his destination, was guilty of contributory negligence, held for the jury.—Cincinnati, N. O. & T. P. Ry. Co. v. Tharp, U. S. C. C. A., 223 Fed. 615.

21. **Chattel Mortgages**—Recording. — Under Rev. St. c. 93, § 1, a chattel mortgage under which possession was not delivered cannot be upheld, unless the town in which it was recorded was the residence of the mortgagor.—Horton v. Wright, Me., 94 Atl. 883.

22. **Commerce**—Workmen.—A workman on a temporary bridge over which the railroad intended to run interstate trains is "employed in interstate commerce," within the federal Employers' Liability Act.—Columbia & P. S. R. Co. v. Sauter, U. S. C. C. A., 223 Fed. 604.

23. **Contracts**—Building Contract.—Under a building contract apportioning loss in case of burning of building before completion, held, the contractor was entitled to only 75 per cent of value of work done before last preceding pay day.—Savage v. Smith, Cal., 150 Pac. 353.

24.——Construction.—The rule that the courts must give effect, if possible, to all terms of a contract, applies to instruments partly written and partly printed, as well as to those wholly written or wholly printed.—Eastern Bridge & Structural Co. v. Curtis Bldg. Co., Conn., 94 Atl. 921.

25.——Public Policy.—Contract between railroad company and labor union providing for employment of specific percentage of employes from members of such union, held not against public policy, in view of Pen. Code 1911, arts. 1477, 1479.—Underwood v. Texas & P. Ry. Co., Tex. Civ. App., 178 S. W. 38.

26.——Words and Figures.—In contracts for the payment of money, where the amount is expressed in both words and figures, the figures yield to the words.—Romine v. Haag, Mo., 178 S. W. 147.

27. **Corporations**—Contract.—Rule that a corporation may avoid a contract made with a director and recover the money paid applies only where the director's conduct was an attempt to unite his personal and representative characters.—California & Arizona Land Co. v. Cuddeback, Cal. App., 150 Pac. 379.

28.——Examination of Books.—A stockholder's common-law right to examine books, records, and papers of the corporation is to be enforced only where his demand is in good faith, for a proper purpose, and for reasons connected with his rights as stockholder.—State ex rel. Holmes v. Doe Run Lead Co., Mo. App., 178 S. W. 298.

29.——Pledge.—Where a transferee of stock pledged same to secure his debt, the pledgee may collect dividends on liquidation of the corporation's affairs, on notice to the corporation; but it is not liable for dividends paid to the original holder before notice.—Merchants' & Mechanics' Bank v. Boyd Co., Ga., 85 S. E. 914.

30.——Repurchase of Stock.—Where a seller of stock breached his contract to repurchase at the price paid by the buyer, the buyer could recover the price paid on tendering the stock.—Klein v. Johnson, Mo. App., 178 S. W. 262.

31. **Covenants**—Breach. — Rights-of-way for irrigation ditches incumbering the record, indefinite in extent not yet established or open to view by inspection, with rights of the servient fee holder undetermined, held incumbrances in breach of covenant.—Feldhut v. Burummitt, Kan., 150 Pac. 549.

32. **Criminal Law** — Accomplice.—A woman permitting another to commit an abortion on her is not an accomplice.—Gray v. State, Tex. Cr. App., 178 S. W. 337.

33.——Evidence.—Voice is a competent means of identification, and a witness who recognized accused's voice over the telephone may testify as to his remarks.—Collins v. State, Tex. Civ. App., 178 S. W. 345.

34.——Flight.—In a criminal case, flight is presumptive evidence of guilt that may be considered by the jury.—State v. Lewkowitz, Mo., 178 S. W. 58.

35. **Damages**—Interest.—A claim for the conversion of a bank draft of a given amount is a liquidated claim, on which interest may be allowed.—Hooten v. State, Ark., 178 S. W. 310.

36. **Death**—Child's Services.—In determining the damages recoverable for loss of a child's services during the remainder of its minority, the probable future increase of earning capacity may be considered.—Central of Georgia Ry. Co. v. James, Ga., 85 S. E. 920.

37.——Federal Employers' Liability Act.—Where a locomotive engineer was killed while operating his locomotive imprudently, negligently, or contrary to some rule of the road for his governance, his representative was not necessarily barred from recovery, under the federal Employers' Liability Act.—Louisville & N. R. Co. v. Fleming, Ala., 69 So. 125.

38.——Negligence.—Negligence causing injury is not the proximate cause of death from subsequently contracted typhoid fever, though deceased's weakened condition from the injury made him more susceptible to and less able to resist the disease.—St. Louis, I. M. & S. R. Co. v. Steel, Ark., 178 S. W. 320.

39. **Deeds**—Delivery.—The legal execution and delivery of a deed are essential to its va-

lidity, and without a delivery a deed is void from the beginning.—Hitchens v. Ellingsworth, Del. Super., 94 Atl. 903.

40. **Divorce**—Alimony.—A divorced husband cannot defend an action for unpaid alimony on the ground of fraud by the wife in which he acquiesced in procuring the divorce.—Cheever v. Kelly, Kan., 150 Pac. 529.

41.——Condonation.—Where a husband condoned his wife's misconduct by a reconciliation and living with her, a commission of the same offense by the woman revives the original offenses, as ground for divorce.—Eistedt v. Eistedt, Mich., 153 N. W. 676.

42. **Electricity**—Negligence.—A city under duty to connect a house wired for electricity with its light line is relieved by neglect to do so only by the property owner's voluntarily undertaking the work himself.—Elias v. City of New Iberia, La., 69 So. 141.

43.——Negligence.—It is actionable negligence for an electric company to cut its service wires to a burning building before there was any reasonable necessity, and thereby deprive the tenant of an opportunity to remove his goods.—Mullen v. Otter Tail Power Co., Minn., 153 N. W. 746.

44. **Estoppel**—Statute of Frauds.—It would be fraudulent for a party to repudiate his gift of land, under which permanent improvements were made by the donee, as void under the statute of frauds and assert a right in contravention thereof.—Trebesch v. Trebesch, Minn., 153 N. W. 754.

45. **Evidence**—Relationship.—Relationship of one person to another cannot be proved by declarations of neighbors.—Gibson v. Dickson, Tex. Civ. App., 178 S. W. 44.

46. **Executors and Administrators** — Wild Lands.—The subsequent passing by the ordinary of an order empowering the executors to sell testator's wild land at their discretion held a ratification of the prior sale of a particular lot of wild land by the executors.—Rowe v. Henderson Naval Stores Co., Ga., 85 S. E. 917.

47. **Fraud**—Burden of Proof.—Under a petition in an action for fraudulently procuring plaintiffs to purchase one-half of the stock of a mining corporation, held, that the burden was on the plaintiffs to prove the representations, falsity, scienter, deception and injury.—Dillon v. Hill, Mo., 178 S. W. 85.

48.——Evidence.—In an action for fraud in obtaining goods on credit, evidence of subsequent transactions by the buyer held admissible.—Krolik v. Lang, Mich., 153 N. W. 686.

49.——Presumption of Knowledge.—In an action by one director against another for deceit, whereby plaintiff was induced to purchase corporate stock, held no defense that plaintiff, as director, was presumed to have knowledge of the corporate affairs.—Halsell v. First Nat. Bank of Muskogee, Okla., 150 Pac. 489.

50. **Frauds, Statute of**—New Consideration.—The statute of frauds does not apply to an oral promise to pay the debt of another founded on a new consideration moving to the promissor and beneficial to him.—Moore v. McHaney, Mo. App., 178 S. W. 258.

51.——Part Performance.—The term "part performance" is really a misnomer, and is used as a convenient statement of the general ground on which verbal agreements regarding realty are enforced.—Trebesch v. Trebesch, Minn., 153 N. W. 754.

52.——Writing.—Letters, telegrams, receipts, and similar informal writings, without any formal document, will satisfy the statute of frauds, if they contain the essential elements of the agreement.—Derrick v. C. W. R. Ford Co., Cal. App., 150 Pac. 396.

53. **Fraudulent Conveyances**—Evidence.—In a suit to set aside, as fraudulent, conveyances made by one corporation to two others which had common directors and stockholders, a finding that the grantees were not mere continuations of the grantor held not contrary to the evidence.—Atkinson v. Western Development Syndicate, Cal., 150 Pac. 360.

54. **Game**—Police Power.—As the states retained all powers not granted to the federal government, the states, as sovereignties, have the exclusive right to regulate the taking and capturing of wild game, unless such right is conferred upon the federal government.—State v. Sawyer, Me., 94 Atl. 886.

55. **Garnishment**—Property Subject to.—The interest of a creditor in property conveyed to trustees, the proceeds to be distributed to creditors, held subject to garnishment.—National Surety Co. v. Hurley, Minn., 153 N. W. 740.

56. **Homicide**—Threats.—Evidence that defendant had made threats against police officers was properly admitted, as tending to show an intentional and malicious killing of policemen who had come to arrest defendant.—Sharp v. State, Ala., 69 So. 122.

57. **Husband and Wife**—Abandonment.—Rev. St. 1909, § 4789, punishing as a vagrant a husband abandoning his family, requires the abandonment to be willful.—State v. Burton, Mo. App., 178 S. W. 219.

58. **Injunction**—Special Injury.—One who will suffer special and peculiar injury of an irreparable nature by the erection of a building, in violation of a fire limits ordinance, may enjoin the erection thereof.—Shelton v. Lentz, Mo. App., 178 S. W. 243.

59. **Insurance**—Benefit Society. — That no means have been provided to enable an incorporated fraternal beneficiary association to respond to a money demand does not relieve it from liability or prevent rendition of judgment on such a demand.—Bass v. Life & Annuity Ass'n, Kan., 150 Pac. 588.

60.——Conflict of Laws.—A fire insurance contract, valid in the state where made, is valid in Arkansas, where the property is located.—Massachusetts Bonding & Ins. Co. v. Home Life & Accident Co., Ark., 178 S. W. 314.

61.——Fraud.—Where insured, when applying for insurance, makes truthful statements to the agent, who fills out the application not in accordance therewith, but falsely, the insured not reading over such application or suspecting disparity, he is not guilty of fraud, and may recover on the policy.—Simmons v. National Live Stock Ins. Co., Mich., 153 N. W. 696.

62.——Notice of Cancellation.—Notice of the cancellation of a policy, to be effectual, must be according to the provisions of the policy, and must be peremptory, explicit and unconditional.—American Fidelity Co. v. R. L. Ginsburg Sons' Co., Mich., 153 N. W. 709.

63.——Waiver.—The acceptance of past-due assessments on a life insurance policy, without demand for a physical examination, held to waive the company's right to forfeit the policy if the assessments were paid within a reasonable time.—Runbeck v. Farmers' & Bankers' Life Ins. Co., Kan., 150 Pac. 586.

64. **Judgment**—Conclusiveness. — One who conveyed land to another to enable the grantee to attack a prior conveyance for the benefit of the grantor is concluded by the judgment

against his grantee.—Telford v. Pennsylvania Iron & Steel Co., Minn., 153 N. W. 758.

65. **Judicial Sales**—Conversion.—An owner of property may sue for conversion by a purchaser at a void judicial sale.—Winchester v. Burris, Mo. App., 178 S. W. 286.

66.——Distribution of Funds.—A trustee residing in another state and representing holders of bonds secured by a mortgage on Louisiana land is not entitled to the fund from a judicial sale of the property, to be taken by it into another jurisdiction, where other costs will be incurred in distributing the fund among bondholders.—Dunlap v. Whitmer, La., 69 So. 189.

67. **Libel and Slander**—Burden of Proof.—Plaintiff, suing for slander, must prove publication by showing that the slanderous words were communicated to some third person, who understood them.—Walker v. White, Mo. App., 178 S. W. 254.

68.——Privilege.—Where a communication by residents of a school district to the school board requesting the removal of the teacher for immorality, was privileged, the privilege was not affected by excessive publication.—Hoover v. Jordan, Colo. App., 150 Pac. 333.

69.——Venue.—A newspaper corporation cannot be sued for libel in a county other than that of its principal place of business, though copies containing the libel were sold in such county. —Davidson v. Pulitzer Pub. Co., Mo., 178 S. W. 68.

70. **Licenses**—Surety.—A municipal ordinance requiring the owners or operators of a jitney bus to give a bond in a certain sum conditioned upon payment of damages for injuries to person or property, is not invalid in requiring the bond to be that of a surety company.—Ex parte Cardinal, Cal., 150 Pac. 348.

71. **Life Estates**—Sale.—Where testator bequeathed life estates to his children, with power to terminate same and dispose of their shares, and the sons submitted to judgments in favor of their mother, and their interests were bought in by the mother, the sheriff's sale merely affected their terminable life estates.—Ryan v. Cullen, Kan., 150 Pac. 597.

72. **Limitations of Actions**—Part Payment.—Part payments will stop the running of limitations on notes, and the notes themselves may be enforced, as well as a deed of trust given to secure a payment; the deed being a mere incident to the notes.—Johnston v. Ragan, Mo., 178 S. W. 159.

73. **Marriage**—Conflict of Laws.—The law governing the validity of a contract of marriage is the law of the state where it was made.—Henderson v. Ressor, Mo., 178 S. W. 175.

74. **Master and Servant**—Burden of Proof.—In an action for injuries from a defective appliance under the Employers' Liability Act, the burden was on plaintiff to show that a defect existed which proximately caused the injury, and had arisen from, or not been discovered or remedied owing to the master's negligence.—Louisville & N. R. Co. v. Hall, Ala., 69 So. 106.

75.——Contributory Negligence.—Act of locomotive engineer in running at high speed, knowing that there was likely to be an engine left on or too near his track on a crossover, was contributory negligence, and not an assumption of risk.—Louisville & N. R. Co. v. Fleming, Ala., 69 So. 125.

76.——Contributory Negligence.—An experienced machinist was not entitled to recover from his employer for injuries received while he was oiling a machine in motion and using an oil can with a short spout, thus increasing the danger, though the machine was not guarded.—Barrientos v. Brennan, Pa., 94 Atl. 927.

77.——Insurer.—An employer is not an insurer of the safety of his employe, and, within the limits of ordinary prudence, may conduct his business in his own way.—Chandler v. St. Joseph Lead Co., Mo. App., 178 S. W. 217.

78.——Pleadings.—Where a railroad company desires to defeat a widow's right to sue for the death of her husband, by evidence that he was engaged in interstate commerce, it must specifically plead such fact.—Louisville & N. R. Co. v. Barrett, Ga., 85 S. E. 923.

79. **Mines and Minerals**—Forfeiture.—To entitle a part owner of a mining claim to forfeit the interest of another part owner for failure to contribute to assessment work for any year, he must have done the amount of work required by statute to protect the title to the claim for that year.—Pack v. Thompson, U. S. C. C. A., 223 Fed. 635.

80. **Municipal Corporations**—Civil Action.—A prosecution for violation of a municipal ordinance, creating an offense not existing under the public laws, is a "civil action."—Village of Marble Hill v. Caldwell, Mo. App., 178 S. W. 226.

81.——Franchise.—A charter of a city, authorizing granting of franchises for use of streets for any public purpose, covers any franchise in the interest of the public.—Greene v. City of San Antonio, Tex. Civ. App., 178 S. W. 6.

82.——Negligence.—That some of the bricks in a sidewalk were missing, leaving a depression about three inches in depth, does not show negligence, authorizing a recovery by a pedestrian, who fell in stepping into one of the holes.—City of Meridian v. Crook, Miss., 69 So. 182.

83.——Repeal.—Where the violation of one of two ordinances on the same subject would not necessarily be a violation of the other, the ordinance of earlier date is not repealed, unless the repeal is expressed in the ordinance of later date.—Town of Hammond v. Badeau, La., 69 So. 202.

84. **Negligence**—Attractive Nuisance.—A contractor, grading grounds surrounding school buildings for minor grades, who left unfastened a wheeled scraper, held liable for injury to a child playing with the scraper.—Jorgenson v. Crane, Wash., 150 Pac. 419.

85.——Defined.—Actionable negligence involves the existence of defendant's duty to protect plaintiff from injury, failure to perform the duty, and resulting injury to plaintiff.—McGuire v. Chicago & A. R. Co., Mo., 178 S. W. 79.

86.——Imputability.—Negligence of the driver of a private conveyance, in which a person of mature years is riding as a voluntary passenger, is imputable to the latter.—Lake v. Springville Tp., Mich., 153 N. W. 690.

87. **Parties**—Amendment.—Where the committee of an insane person brought an action for injuries to his ward improperly in his own name as guardian ad litem, the trial court could have allowed amendment of the caption of the summons and complaint.—Peiper v. Shahid, S. C., 85 S. E. 905.

88. **Partnership**—Bills and Notes.—A trading partnership is liable on a note made in its name by one of its members, though he made it without authority and appropriated the proceeds to his own use, where the payee was without notice and acted in good faith.—First Nat. Bank of St. Paul v. Webster, Minn., 153 N. W. 736.

89.——Individual Debt.—A partner is competent to show that he had authority to use the partnership funds to pay his individual debts, although that is not one of his implied powers. —Munday Trading Co. v. J. M. Radford Grocery Co., Tex. Civ. App., 178 S. W. 49.

90. **Party Walls**—Contract.—A party wall contract held to render one owner liable to the other for loss occasioned by the falling of a part of the wall which the latter was not using. —McKnight v. Strasburger Bldg. Co., Kan., 150 Pac. 542.

91. **Payment**—Note.—The taking of a note for an antecedent debt does not extinguish the indebtedness, absent an agreement to that effect at the time.—People's State Savings Bank v. Missouri, K. & T. Ry. Co., Mo. App., 178 S. W. 292.

92. **Physicians and Surgeons**—Expert Testimony.—Professional skill, negligence, etc., on the part of physician or surgeon held to be shown by testimony of those learned in such matters, and not to be determined from jury's

unprofessional notions of proper treatment.—Zoterell v. Benn, Mich., 153 N. W. 692.

93. **Pledges**—Injunction. — One holding a mortgage note as collateral for a debt due by the maker should be enjoined from collecting the difference between the amount of the debt and the amount of the mortgage note.—Crowley Bank & Trust Co. v. Hurd, La., 69 So. 175.

94. **Powers**—Officer.—A power conferred on a person who, at the time of the exercise of the power, may hold a particular office, attaches to the individual and not to the office.—Rowe v. Henderson Naval Stores Co., Ga., 85 S. E. 917.

95. **Principal and Agent** — Customs and Usages.—Proof of custom in the trade or business as to sales by agents is admissible only when the agency has been first shown, and then not to enlarge the powers of the agent, but only to show the extent of the powers actually conferred.—Caughren v. Kahn, Wash., 150 Pac. 445.

96. **Principal and Surety**—Building Contract. —A stipulation in a building contract for payments on monthly estimates of work done and materials furnished and paid for in the building requires the owner to ascertain approximately that the work done and materials furnished, for which payment was made, had entered into building.—Dunne Inv. Co. v. Empire State Surety Co., Cal. App., 150 Pac. 405.

97.——Commercial Surety.—The rule that a surety is a favorite of the law and a claim against him is strictissimi juris does not apply to a commercial surety.—State v. National Surety Co., Md., 94 Atl. 916.

98.——Consideration.—A surety for consideration is not discharged by every variation in the terms or performance of the principal contract, but it can insist upon compliance with requirements made the condition of its liability.—Doyle v. Faust, Mich., 153 N. W. 725.

99.——Consideration.—Where the directors of a corporation, who were also its sole owners, became sureties for money borrowed and used by the corporation, they are sureties for consideration and not entitled to the benefit of the rules favoring voluntary sureties.—Mercantile Trust Co. v. Donk, Mo., 178 S. W. 113.

100. **Railroads**—Imputed Negligence.—Plaintiff crossing railroad in buggy driven by another, who was negligent to the knowledge of the plaintiff, held bound to exercise due care for his own safety, and chargeable with negligence if he omitted all precautions.—Landrum v. St. Louis, I. M. & S. Ry. Co., Mo. App., 178 S. W. 273.

101.——Last Clear Chance.—Where an automobile approaches a crossing at the same time that an electric car is coming, if either the driver or the motorman sees the other intends to cross first he must stop, if necessary, to prevent a collision.—Pascagoula St. Ry. & Power Co. v. McEachern, Miss., 69 So. 185.

102.——Negligence.—For injuries resulting from frightening horses by sight of trains, handcars, or speeders, or noises necessarily incident to its operation, a railroad is not liable.—Culbertson v. St. Louis, I. M. & S. Ry. Co., Mo. App., 178 S. W. 269.

103. **Set-Off and Counterclaim** — Equity.—Equity will compel a set-off of mutual demands, where necessary to enable the party claiming it to collect his claim; and the insolvency of the party against whom the relief is sought is ground for invoking such remedy.—Machado v. Borges, Cal., 150 Pac. 351.

104. **Specific Performance** — Equity. — An award of arbitrators may be enforced by specific performance, although it could not form a basis for a decree because of want of a preliminary order authorizing it.—Black v. Woodruff, Ala., 69 So. 97.

105.——Equity.—The holder of an option to purchase real estate cannot, after refusing to purchase at the price stipulated and after sale to another, maintain a bill for cancellation of the deed to such purchaser, and for specific performance.—Cummings v. Nielson, Utah, 150 Pac. 295.

106. **Sunday**—Ratification.—Where the principal maker of a note made on Sunday procures the signature of the surety and delivers the note on a week day, he ratifies the same.—Young v. Dublin Fertilizer Works, Ga. App., 85 S. E. 941.

107. **Telegraphs and Telephones**—Negligence. —Where officers of a municipality coiled a loose wire about a telephone company's pole, and it fell to the sidewalk, so that plaintiff tripped, held, that the telephone company was not liable; it not knowing of the matter.—Mickle v. Southern Bell Telephone & Telegraph Co., Ala., 69 So. 105.

108.——Non-User.—Where a telephone company's franchise authorized it to operate an automatic telephone system and to conduct a general telephone and telegraph business, the abandonment of automatic telephones and the installment of manual telephones did not constitute a non-user authorizing forfeiture.—Sunset Telephone & Telegraph Co., Wash., 150 Pac. 427.

109. **Trade-Marks and Trade-Names**—Property in.—A trade-mark held not property, as such, until it has become associated with and is a part of the business with which it has been connected.—Detroit Creamery Co. v. Velvet Brand Ice Cream Co., Mich., 153 N. W. 664.

110. **Trusts**—Bills and Notes.—That a person took a note payable to his estate did not deprive him of the right to dispose of it during his lifetime.—Poole v. Poole, Kan., 150 Pac. 592.

111. **Vendor and Purchaser**—Reservation.—A reservation in a deed tendered a vendee, of the right of an agency of the state to enter on the land to construct drainage canals held not an incumbrance of which the vendee could complain under the circumstances and in view of the fact that he bought knowing that the land was in a drainage district specifically named by Laws 1907, c. 5709.—Richardson-Kellett Co. v. Kline, Fla., 69 So. 203.

112. **Use and Occupation**—Evidence.—In use and occupation for the rental of a tobacco warehouse, because through the parties' failure to agree on details no completed contract of lease was made, it was proper to admit defendants' letters agreeing to a specified rent, as tending to prove one of the elements of the contract agreed upon.—Holliday v. Pegram, S. C., 85 S. E. 908.

113. **Warehousemen** — Lien-Holders. — The deposit of property in a warehouse and the negotiation of the warehouse receipt does not affect the rights of lien-holders.—Sanders v. Standard Warehouse Co., S. C., 85 S. E. 900.

114. **Waters and Water Courses** — Adverse User.—That title to waters may be acquired by adverse user, it is necessary that during the entire statutory period there shall have been an infringement upon another's right to such an extent as to give a cause of action against the claimant.—Dontanello v. Gust, Wash., 150 Pac. 420.

115.——Appropriation.—A subsequent appropriator cannot complain that the original appropriator, who first stored the water before using it, subsequently diverted it from storage for immediate use.—Phillips Inv. Co. v. Cole, Colo. App., 150 Pac. 331.

116.——Contract.—Under an entryman's contract with a company operating under the Carey Act, held, that the title to a water right procured from the company did not vest in the entryman until he made full payment for same. —Bennett v. Twin Falls North Side Land & Water Co., Idaho, 150 Pac. 336.

117. **Wills**—Declarations of Decedent.— Declarations of deceased, made after the execution of the will, cannot be used to overturn it. —Padgett v. Pence, Mo. App., 178 S. W. 205.

118. **Witnesses**—Cross-Examination. — Casting a cloud on a witness by cross-examination suggestive of a corrupt motive authorizes evidence of his consistent statement before he could have been corrupted.—Kelly v. American Cent. Ins. Co., Mo. App., 178 S. W. 282.

119.——Privilege.—Communications by a party suing for personal injuries, to a physician examining him under order of court, held not privileged, within Rev. St. 1909, § 6362.—McGuire v. Chicago & A. R. Co., Mo., 178 S. W. 79.